IN THE HIGH COURT OF UTTARAKHAND, ATNAINITAL
CRIMINAL APPEAL NO.1353 OF 2001
(OLD NO. 1178/1987)

The State .... Appellant

Versus

Mukesh, S/o Rohitash Singh, R/o 7 Lakshmi Road, New Dalanwala, District Dehradun.

..... Opposite Party

Dated: 13th August, 2007

Sri. Nandan Arya, learned AGA for State/appellant.
Sri Arvind vashisth, learned counsel for the respondent.

HON. DHARAM VEER, J.

This appeal, preferred under Section 378(1) of the Code of Criminal Procedure, 1973 (*hereinafter to be referred as Cr.P.C.)* is directed against the judgment and order dated 23.01.1987 passed by the Chief Judicial Magistrate, Dehradun in Criminal Case No.1222/1883 State Vs. Mukesh under Section 25 of Arms Act, 1959 whereby, the Chief Judicial Magistrate, Dehradun has acquitted the respondent for an offence punishable under Section 25 Arms Act, 1959.

2. In brief the prosecution story is that on 26.02.1983 at 12.10 A.M., Sub Inspector Prem Pal Singh with S.I. Nirankar Singh, S.I. Chandra Singh Rathor, Constable Amar Singh and Constable Surajpal Singh was on patrolling duty. They have reached in front of the Prabhat Cinema, Dehradun, where the present applicant was arrested by them and from the right pocket of his pant, one pistol factory made No.384204, MAUSER WERKE A.G.O.BERNDOLF, in the right of the body, CAL 6.35 made in Germany was printed and in the magazine of the Mouser, 4 live cartridges were recovered on the spot. The recovery memo was prepared on the spot by S.I. Prem Pal Singh and on the basis of this recovery memo, the F.I.R. was lodged in the Police Station, Kotwali Dehradun on 26.02.1983 at 1.30 A.M. by S.I. Prem Pal Singh. The recovery memo is Ex.Ka.1 and the F.I.R. is Ex.Ka.2. The entry was made in the G.D. on 26.02.1983 at 1.30 A.M. and the

carbon copy of the G.D. is Ex.Ka.3. The investigation of the case was entrusted to S.I. Sunder Lal Kannojia. During the course of investigation, the I.O. had prepared the site plan that is Ex.Ka.4 and recorded the statements of the witnesses and thereafter submitted the charge sheet under section 25 Arms Act against the respondent. After submitting the charge sheet, he had taken the sanction from the District Magistrate, Dehradun on 27.04.1983 i.e. Ex.Ka.5 and sealed mohar was also prepared on the spot, i.e. Ex.Ka.7.

3. On 14.02.1984, Chief Judicial Magistrate, Dehradun has framed the charge against the present respondent u/s 25 of Arms Act. At the time the framing the charge, the respondent had given the statement in the court that he was participating in an auction of liquor against Rajendra Chaudhary and due to this reason, he was called in the Police Station by S.I., Narankar Singh and the instructions were given to Nirankar Singh to call him by Inspector D.P. Sharma and they had asked the respondent not to participate in the auction of liquor so that Rajendra Singh may take the shop of liquor in auction.

4. To prove its case, the prosecution had examined PW.1 Sub-Inspector Prem Pal Singh who has stated in his statement that on 26.02.1983 he was posted as S.S.I., Kotwali Dehradun and on that night, S.I. Nirankar Singh, S.I. Chandra Singh Rathour, Constable Amar Singh and Constable Suraj Pal Singh were in the patrolling duty in the area of Out Post Dhara. At about 12.10 A.M., they reached at Chakrata Road, in front of Prabhat Cinema Hall. There the present respondent Mukesh was arrested by these persons and from his possession one pistol i.e. Ex.1 and four live cartridges of magazine i.e. Ex.2 to Ex.5 were recovered. He had asked for license but Mukesh could not produce any license. The recovery memo Ex.Ka.1 was written on the spot by him and other witnesses have signed on it. The copy of the recovery memo was given to the present respondent who has refused to

take the recovery memo but he had signed on the said recovery memo. He has further stated that the pistol number and mark was written in the recovery memo and the pistol was sealed in a cloth i.e. Ex.6 and specimen of seal was prepared on the spot that is Ex.7 and on that other witnesses had also signed. No witness from the public place was ready to give the witness. Thereafter, the case property along with the present respondent were taken to the police station and the case was registered in the police station, the FIR is Ex.Ka-2 which was written by Constable Clerk Narottam Prasad. The entry was also made in the G.D. by him i.e. Ex.Ka-3. In the cross examination in page No.4, this witness has stated that in front of cinema, scooter, three wheelers and care etc. were standing there and number of persons was collected and the respondent was searched in front of the number of people. He had asked the names of the persons but the persons had gone from there. "यह बात सही है कि सिनेमा के समाने स्क्रूटर, थ्री हवीलर, कारें आदि खड़ी थी। भीड़ वहाँ पर काफी इकट्ठी हो गई थी। भीड़ के सामने ही हमने मुलजिम की तलासी ली थी। मैनें भीड़ वालों के नाम पूछे थे वहाँ कोई नहीं रूका सब चले गये". In page 5 of his cross-examination, he has stated that at present number of the pistol was not legible and whatever the mark was in the cartridge, that was written in Fard and the number in the cartridge was also not legible at that time. "पिस्टल पर इस वक्त नम्बर पढ़ने पर नहीं आते। कारतूसों पर जो मार्का था वह फर्द में लिख दिया था। इस समय कारतूस का नम्बर पढ़ने में नहीं आ रहा है। फर्द हमने मौके पर लिखी थी। वहॉ पर बिजली की रोशनी थी। दरोगा जी ने नक्शा मेरे सामने नहीं बताया". He has further stated that the I.O. had not prepared the map in his presence. In page No.7 of cross-examination, he has stated that he had not mentioned that he had asked the names of the public witnesses. "फर्द में गवाहान के नाम पूछने वाली बात नहीं लिखी यह बात सही है" He has stated in his settlement recorded by the I.O. during the investigation that he had not asked the appellant to receive the Fard in the way and he had taken the copy of Fard. "*मैंने दरोगा जी को यह बयान नहीं दिया था कि रास्ते में मुलजिम को नकल फर्द पुनः लेने को कहा तो उसने नकल ले ली थी। मैं नही बता सकता कि*

यह बात मेरे बयान में कैसे लिख दी।' He could not say how the I.O. had written this information in his statement recorded u/s 161 of Cr.P.C.

5. The next witness examined by the prosecution is the S.I. Chandra Singh Rathour who has stated in his statement that on 26.2.1983, he was posted as Sub-Inspector in Kotwali Dehradun. On that day along with S.S.I. Prem Pal Singh, S.I. Nirankar Singh, Constable Amar Singh and Constable Suraj Pal Singh, he was doing patrolling in the area of Out Post Dhara and when he reached in front of Prabhat Cinema, Chakrata Road, Dehradun, about 12:10 A.M., the present respondent was arrested by them and from his possession, one mouser pistol Ex.1 and magazine with four live cartridges Exs.2 to 5 were recovered. For that, the respondent was having no licence and the recovery memo Ex.Ka-1 was written on the spot and he had also signed on that recovery memo. The copy of the Fard was given to the accused/respondent but he refused to take but he had signed on that recovery memo. The cloth in which the cartridges and pistol were sealed, i.e. Ex.6 and the seal mohar is Ex.7. In cross-examination, he had stated that when the respondent was arrested, then so many persons were there but he had not tried to ask the names of anybody. He had further stated that numbers were printed on the cartridge but that were not legible at the time of his statement but the description was there in the recovery memo. He has further stated in his cross-examination that D.P. Sharma was the Inspector at that time. He had further stated in the court that the pistol was having rust.

6. P.W.3 is Constable Narottam Prasad who has stated that on 26.2.1983, he was posted in Kotwali as Constable Clerk. The FIR of the present case was written by him i.e. Ex.Ka-2. The FIR he had written on the basis of Fard i.e. Ex.Ka-1 and the entry was made in the G.D., the copy of G.D.

is Ex.Ka-3 and the case property was filed in the *Maalkhana.* He had also admitted in the cross-examination that the respondent was also a contractor of the liquor.

7. After that the statement of the respondent/accused was recorded u/s 313 of Cr.P.C. who has denied the allegations made against his and has stated that on 25.2.1983, S.I. Narankar Singh had called him in the police station for enquiry in the evening and he had asked him not to participate in the contract of liquor. When he refused to accept the order of S.I., then he was falsely implicated. In support of his oral evidence, he had examined D.W.1 Hemendra Gupta who has stated that the present incident relates to February 1983. He along with present respondent was present in the Chakrata Road for taking some shop and the respondent/ accused was a liquor contractor and for that purpose, the shop was required. About 6:00 P.M., S.I. Nirankar Singh had come there and then he had told him that Inspector D.P. Sharma had called him for certain inquiry. Then Mukesh had gone with him to Kotwali Dehradun. On the next day, he had narrated the incident to the brother of the Mukesh (present respondent). On 26.2.1983, he went to Kotwali Dehradun and then S.I. had told him that after the compromise with the Rajendra Chaudhary, he would be released because D.P. Sharma wanted that the liquor contract should go in favour of Rajendra Chaudhary. After that he was challened in the present false case.

8. After appreciating the entire evidence on record and after hearing learned counsel for the parties, the learned CJM, Dehradun vide his judgment and order dated 23.01.1987 acquitted the respondent for an offence punishable u/s 25 of Arms Act. Against the said judgment and order-dated 23.1.1987, the State has preferred the present appeal before this Court.

9. I have heard Sri Nandan Aray, learned AGA for the State and Sri Arvind Vashisth, learned counsel for the respondent and perused the entire material available on record.

10. Learned AGA for the State/appellant argued that the case against the respondent is proved as per the evidence produced by the prosecution and the recovery of the mouser and four live cartridges was proved on the respondent on the aforesaid date and time. Learned counsel for the respondent has submitted that the prosecution has failed to prove its case against the respondent. He firstly submitted that the recovery of the weapon was shown to be made by the police in the public place in front of the Prabhat Cinema where the number of persons were present, but no public witness was cited as a witness of the recovery memo and in the investigation, the I.O. had not recorded the statement of any public witness and no public witness was produced in the trial. This factual position creates a dobut in the prosecution story. From the evidence of P.W.1 S.I. Prem Pal Singh and P.W.2 S.I. Chandra Singh Rathor, it is well established that when the recovery of the above-said pistol and cartridge were shown from the respondent, number of persons were present there and the recovery was made after finishing the show of the picture hall at 12:15 A.M. on 26.2.1983 and the nearing parking place where the cars, scooters and other vehicles were also there. From this circumstances, it is clear that the recovery was shown in the presence of the public witness but no public witness was shown as a witness in the recovery memo and I.O. had not recoded statement of any public witness and even no public witness was examined in the court and as such it creates a doubt in the prosecution case.

11. Learned counsel for the respondent next argued that prosecution has failed to prove that the pistol/mouser and cartridges which were shown to be recovered from the respondent on 26.2.1983 at 12:15 A.M. were the same as

produced in the court at the time of evidence. In support of his argument, he has referred the statement of P.W.1 S.I. Prem Pal Singh and P.W.2 S.I. Chandra Singh Rathor where they have stated that the number and mark in the pistol and in the cartridges were not legible in the court. They have stated that numbers were mentioned in the recovery memo. In support of his argument, learned counsel for the respondent has cited a judgment of Hon'ble Apex Court in the case of 1998(8) SCC 525 *Jasbir Singh v. State of Punjab* and he relied on para 3 of the said judgment which reads as under: -

> ***"3.*** *What is contended by the learned counsel for the appellant is that the prosecution evidence itself shows that the pistol and the cartridge alleged to have been recovered from the appellant did not have any number or some distinctive mark on them and after their seizure by the police they were not sealed. Thus the identity of the weapon and the cartridges seized and the weapon and cartridges produced before the Court was not established by the prosecution. Having gone through the evidence, we find that the contention raised on behalf of the appellant is correct and, therefore, deserves to be accepted. The pistol and the cartridges did not have any mark or any number on them and after seizing the same the police had not thought it fit to wrap them and apply a seal over them. No explanation in that behalf was given by the prosecution witnesses. This aspect was not considered by the trial court. As the identity of the incriminating articles has not been established by the prosecution, we allow this appeal, set aside the conviction of the appellant both under Section 5 of the TADA Act and Section 25 of the Arms Act and acquit him of all the charges levelled against him."*

12. From the statement of P.W.1 S.I. Prem Pal Singh and P.W.2 S.I. Chandra Singh Rathor, it is clear that they have failed to prove that weapons which were recovered on the spot are the same weapons as produced in the court as the numbers mentioned in the recovery memo of the weapon and the cartridges were not printed on the said weapons and cartridges and for this reason they could not be legible in the court.

13. Learned counsel for the respondent further submitted that the weapon was not in the working condition then it will not fall within the definition of Section 2(c) of the Arms Act, 1959 which reads as under: -

2(c) "arms" means articles of any description designed or adapted as weapons for offences, or defence, and includes firearms, sharp-edged and other deadly weapons, and parts of, and machinery for manufacturing arms, but does not include articles designed solely for domestic or agricultural uses such as a lathi or an ordinary walking stick and weapons incapable of being used otherwise than as toys or of being converted into serviceable weapons;

14. Learned counsel for the respondent further submitted that the weapon was not sent for the ballistic expert for the examination whether the present weapon was in working condition or not. He has further argued that P.W.1 S.I. Prem Pal Singh and P.W.2 S.I. Chandra Singh Rathor have not stated in their statements that they have tested the weapons and those weapons were in working condition. In support of this argument, he has cited a judgment of Hon'ble Apex Court in the case of *Manoj Kumar Achhelal Brahman v. State of Gujarat* reported in 1998 SCC (Cri) 636. He relied on para 2 which reads as under: -

"2. *The prosecution case in short is that a theft had taken place in Village Kakaduva on 13-6-1988. When the owner of the house and other villagers were in search of the miscreants responsible for such theft, they spotted five persons present near a tea stall and they suspected their involvement in the case of theft. The matter was reported to the local police and on being searched from the possession of one of the persons, two sarees alleged to be stolen and a country-made pistol and some live cartridges were recovered. The appellant and the other accused were, therefore, tried for offence under Section 3 and Section 5 of the Terrorists and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as TADA) and also under Section 25(1)(b)(a) of the Arms Act. The learned Designated Court, however, acquitted the co-accused because nothing was recovered from his possession but considering the evidence adduced in the case, the appellant was convicted for the offence under Sections 3 and 5 of TADA and Section 25 of the Arms Act. In the instant case, there are independent witnesses who have deposed that from the possession of the appellant an object appearing to be a revolver and live cartridges had been recovered. Such depositions, therefore, appear to be trustworthy and do not deserve to be discarded. But, unfortunately nobody including the police personnel who had seized the said revolver had deposed that the police officer had himself tested the said weapon and found it to be a pistol in working condition. The learned Designated Court in this case has rightly indicated that it is not always necessary to refer the weapon to the ballistic expert for his opinion. In our view the police personnel who everyday deals with rifles and pistols will be competent to tell whether the weapon in question was in working condition or not provided he tests the same. But unfortunately that part of the deposition is missing in this case. It will, therefore, not be*

safe to proceed on the footing that the weapon alleged to have been recovered from the possession of the appellant was really an arm for which either under the Arms Act or under TADA conviction, was warranted. We, therefore, allow this appeal by giving benefit of doubt to the appellant and set aside his conviction and sentence. The appellant has been released on bail during the pendency of the appeal. His bail bonds will stands discharged."

15. From the evidence of P.W.1 S.I. Prem Pal Singh and P.W.2 S.I. Chandra Singh Rathor, it is well established that the weapons were not sent for the ballistic expert for the examination whether the said pistol was in working condition or not and even P.W.1 S.I. Prem Pal Singh and P.W.2 S.I. Chandra Singh Rathor had not stated in their statements that weapons were tested by them. In these circumstances, the argument of learned counsel for the respondent have got weight that it is not proved by the prosecution that whether the weapons were in working condition or not.

16. Learned counsel for the respondent next argued that if two reasonable conclusions are possible on the basis of evidence on record, then the appellate court should not disturb the finding of acquittal recorded by the trial court. In support of this argument, he has cited judgment of Hon'ble Apex Court in the case of *Chandrappa & others v. State of Karnataka* reported in 2007 AIR SCW 1850. He relied on para 39 which reads as under: -

"39. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellant court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasize the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the

fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

17. From the evidence discussed above, one view is also possible which is recorded by the trial court in its judgment. Hence, there is no evidence on the record to go against the findings recorded by the trial court on acquitting the accused/respondent and from the discussion made above and from the evidence and facts and circumstances, I am in full agreement with the view taken by the learned trial court for acquitting the accused u/s 25 of Arms Act, 1959.

18. In view of the above, the appeal of the State is devoid of merit and is hereby dismissed. The judgment and order dated 23.01.1987 passed by CJM, Dehradun is hereby confirmed.

(Dharam Veer, J.)

Rajeev Dang